In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner,

vs.

EAST OHIO GAS COMPANY, et al.,
Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS.

EVERETT C. McKEAGE,
RODERICK B. CASSIDY,
BORIS H. LAKUSTA,
H. F. WIGGINS,
J. THOMASON PHELPS,
HAROLD McCARTHY,
State Building, San Francisco 2, California,
Attorneys for the Public Utilities Commission of the State of California,
As Amicus Curiae.

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

October Term, 1949

No. 71

Federal Power Commission,
Petitioner,
vs.
East Ohio Gas Company, et al.,
Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 173 Fed. (2d), page 429.

PRELIMINARY STATEMENT.

The Public Utilities Commission of the State of California, on whose behalf this *amicus curiae* brief is offered to be filed, is an agency of the State Government of the State of California, existing under and by virtue of the provisions of the Constitution and laws of said State, and having exclusive jurisdiction over all public utilities operating within said State.

FACTUAL SITUATION.

The Court of Appeals has clearly stated the factual situation involved in this controversy at pages 429 to 432 of the Federal Reporter and will not be repeated here (173 Fed. (2d) 429).

CRITICAL ISSUE IS WHETHER OR NOT THE OPERATIONS OF RESPONDENT GAS COMPANY ARE OF A LOCAL NATURE, OR OTHERWISE EXEMPT FROM PROVISIONS OF NATURAL GAS ACT OF 1938.

The fact that some of the operations of respondent gas company constitute interstate commerce (as that term is generally understood) is not at all controlling of the issue herein. That a State may regulate interstate commerce, where the field has not been completely occupied by the Federal power is elementary. (*Simpson v. Shepard*, 230 U.S. 352, 402, 57 L.ed. 1511, 1542; *Kelly v. Washington*, 302 U.S. 1, 9-10, 82 L.ed. 3, 10.) Even where State regulation "materially interferes with interstate commerce," this Court has held, in a very recent case, that such fact is not conclusive of the invalidity of such regulation. (*Rail-*

way Express Agency v. New York, 93 L.ed. (Adv. Op.) 396, 399.) Also, this Court has held that the transportation and sale in interstate commerce of gas directly to the ultimate consumer, although such transportation was across a State line and was interstate commerce beyond any doubt, was of a local nature and subject to State regulation. (*Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 29-31, 64 L.ed. 434, 442.)

Our next inquiry is: Has the Congress, by enactment of the Natural Gas Act of 1938 (15 U.S.C.A. 717-717W), so completely occupied the field as to bring the operations of the respondent gas company within the regulatory jurisdiction of the Federal Power Commission? In arriving at an answer to this question, it must be kept in mind that the superseding of State power by Federal power is never presumed. The conflict between these two powers must be *direct* and *positive*, leaving no doubt that the intention to supersede State power is plainly manifested. (*Kelly v. Washington*, 302 U.S. 1, 9-10, 82 L.ed. 3, 10.) Furthermore, this Court has laid it down as a principle that it "has disfavored inroads by implication on state authority * * *." (*Palmer v. Massachusetts*, 308 U.S. 79, 83-84, 84 L.ed. 93, 97-98.) There can be no possible argument against the proposition that the Congress has exempted from the operation of the Natural Gas Act of 1938 all interstate transportation or sale of natural gas, which is not specifically subjected to the provisions of said Act or which constitutes local distribution of natural gas. Likewise, the facilities used for such distribution are exempted from the provisions of the Act, as are, also, the production or gathering of natural gas. (Sec. 1, 52 Stat. 821, 15 U.S.C.A. 717(b).)

The Court below took the view that the operations of respondent gas company were of a local nature and, therefore, exempt from the jurisdiction of the Federal Power Commission. Also, that Court was of the further view that, due to the fact that all the operations of respondent gas company were subject to State regulation and had actually been subjected to such regulation for many years, such operations were not meant to be subjected to Federal regulation, it being the intent of said Natural Gas Act to *supplement*, not *supersede* State regulation. With these views, we agree.

This Court, by unanimous decision, in the case of *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 689-690, 91 L.ed. 1742, 1748, held that the intent of said Act was to "occupy this field in which the Supreme Court has held that the States may not act." This Court further observed in that case that the intent of the Act is to take no authority from State commissions and is so drawn as to complement and in no manner usurp State regulatory authority. (U.S. Report, p. 690.) To the same effect is this Court's unanimous decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520, 92 L.ed. 128, 139. And, finally, this Court in the very recent case (decided June 20, 1949) of *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 93 L.ed. (Adv. Op.) 1251, 1253-1254, held that the intent of the Natural Gas Act was not to completely occupy the natural gas field to the limit of constitutional power and that the jurisdiction granted to the Federal Power Commission was to complement that of the State regulatory bodies.

CONCLUSION.

In view of the foregoing pronouncements of this Court as to the purpose and intent of the Natural Gas Act of 1938, it is abundantly clear that the attempted exercise of jurisdiction by the petitioner over respondent gas company runs afoul the provisions of said Act as construed and interpreted by this Court. We, therefore, respectfully contend that the decision and judgment of the lower Court are correct and should be affirmed.

Dated, San Francisco, California,
October 3, 1949.

Respectfully submitted,

EVERETT C. MCKEAGE,
RODERICK B. CASSIDY,
BORIS H. LAKUSTA,
H. F. WIGGINS,
J. THOMASON PHELPS,
HAROLD MCCARTHY,
Attorneys for the Public Utilities Commission of the State of California,
As Amicus Curiae.